No. 2730

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK IRVINE,
Appellant.

VS.

ANGUS McDOUGALL, J. A. HEALEY, GEO. M. SMITH and ROY RUTHERFORD,
Appellees.

Appeal from United States District Court, Territory of Alaska, Fourth Judicial Division.

REPLY BRIEF ON BEHALF OF APPELLANT

HARRY E. PRATT
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I

In the first paragraph of that part of the appellees' brief designated "argument," it is stated that there is no assignment of error with reference to the Court's action upon the assigned claim of Tom King. The answer to this statement is merely a reference to the printed record, pps. 91 and 92, and in connection therewith pps. 57, 58, 59 and 60; also pps. 93 and 94. Neither is there any variance between the allegation of the complaint as to King's assign-

ment and the proof for there is no allegation of a written assignment; record page 16.

II.

The spirit of reckless mis-statement was not confined by the appellees to the above mentioned portion of their brief, but was continued to greater length in an attempt to make it appear to this Court, that one of the witnesses on behalf of the appellant, to-wit; Harry E. Pratt, was not sworn, but was allowed to give his testimony upon important matters without an oath. This attempt to thus mislead the Court is indeed bold, for this is a matter in a Court of record where the testimony was taken down by a competent stenographer; where the records of the Clerk of the Court are complete and where the trial was had before the Judge, himself. It is true, that through a stenographical oversight, the words "Harry E. Pratt, duly sworn, testified," were omitted, but the record, page 45, shows the direct testimony of said witness and the questions and answers. The matters testified to are of distinct importance to the plaintiff's case and admissible only as sworn testimony. The certificate to the bill of exceptions (page 67 of record), as well as the preface to said bill (printed record, page 40), conclusively shows that the bill contains only proper testimony and that all of said testimony had a bearing upon those portions of the Court's decision complained of by the plaintiff. Said witness gave said testimony under oath as the record, when fairly viewed, shows.

On the trial of this cause, there was never any dispute about the facts. The uncontradicted evidence showed that the assignments introduced were signed before the filing of the lien claims, given by the lien claimants to their own agent, to-wit; Harry E. Pratt, who was by them, directed to deliver the same to the plaintiff Irvine, after the lien claims had been filed. The evidence further showed that said delivery was made after the lien claims were filed, and before the commencement of this suit. Counsel for appellees and the Court took the view that the mere signing of the assignments, without the assignors parting with control and without any delivery of the assignment or acceptance on the part of the assignee, constituted such a complete parting of title on the part of the assignors that they lost their right to file the lien claims. The Court, on the evidence as above stated, made the erroneous conclusion that the assignment had been completed before the filing of the lien statements and refused to grant plaintiff any relief therefor.

All lien claims were filed for record and the liens perfected by the 7th day of June, 1913. This suit was commenced upon the 23rd day of August, 1913, over two and a half months later. The record shows that upon August 23, 1913, Harry E. Pratt, was one of the attorneys for plaintiff, Jack Irvine. This relationship of attorney and client, however, did not exist, as is shown by the record, until long after the lien claims of the assignors had been filed and deliv-

ery had been made of the assignments to the plaintiff Jack Irvine.

Appellees further claim that the testimony of the witness, Harry E. Pratt, is unsupported. We call attention to the fact that the plaintiff, Jack Irvine, testified on that point as follows:

"Q When was that assignment delivered to you and executed?

"A Shortly after the liens were filed.

"Q With reference to the filing of your suit, when was that delivered to you?

"A It was before the suit was started." (Pps. 40 and 41 of record.

The assignment itself, by its wording, shows that it was intended to be effective only after the liens had been filed, for it assigns, "all rights which I may have by virtue of **having** filed a mechanic's lien." The complaint filed August 23, 1913, in each assigned cause of action, specifically recites that the assignment was made after the lien claims had been filed. (Record, pps. 9, 11, 13, 14, 16 and 18.)

III.

Appellees further state that no personal judgment was asked for against defendant McDougall. Attention is directed to the prayer of the amended complaint (record, p. 19) and to plaintiff's proposed findings of fact and conclusions of law in the printed record, numbers 27 and 28, page 57; Plaintiff's proposed conclusion of law number 4, page 59; Assignments of error numbers 4 and 5, page 92; assign-

ments of error numbers 7, 8, 9, 10, 11, 12, and 13, pages 93 and 94, of printed record.

IV.

The opinion of the trial court dated June 1, 1915, was not such an opinion that it should have been included in the record as it has no lawful existence and is of no legal import.

After hearing an equity case the only thing the Judge has authority to do is to make findings of fact and conclusions of law. Section 1204 Compiled Laws of Alaska, 1913. Any opinion filed by him after the conclusion of the trial, and before the findings of fact, is merely a guide or memorandum for the direction of those preparing the findings of fact and said opinion becomes merged in and supplanted by such findings of fact.

Juneau Water Co. vs. Jualpa Co. 3 Als. Rep. 387.

The endorsements of the recorder upon the lien claims of the plaintiff and his six assignors, show that the liens were filed at the request of Harry E. Pratt. This does not constitute any evidence of anything material to this case. The fact that a designated person has handed a paper to a recorder raises no presumption of agency of any sort other than agency to hand said paper to a recorder. Still further, the certificate of the Judge to the bill of exceptions shows that the bill contains all of the evi dence and exhibits upon which the Court's decision

was based. (Page 67 of record).

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